IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 1353

CHARLES B. SOLOMON, AVERY TUCKER, MARTIN WESTON and JOSEPH B. MOHR,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' PETITION FOR REHEARING

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INDEX TO AUTHORITIES CITED

Cases

Bowery Bank v. United States, 317 U. S. 329, 338
Bay Trader Co. v. United States, 250 U. S. 418
United States v. Houghton, 66 C. A. 90, 270 F. (2d) 290, cert. granted 361 U. S. 508

Statutes

Rules and Regulations Implementing Title II, Public Contracts (41 U. S. C. A., Cum. Supp.) Section 1-1.315-2 (c)
Surplus Property Act of 1944, 58 Stat. 765, 50 U. S. C. A. Appendix, 1946 ed., section 1633 (d) (1) and (2)

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Petitioners request reconsideration of their Petition For Writ of Certiorari. The present argument is addressed primarily to the question: Does the Surplus Property Act of 1944, 58 Stat. 765, 50 U.S.C.A. Appendix, 1946 ed.,

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Petitioners' further arguments on this application for rehearing, based upon *United States v. Hamilton*, (C.C.A. 9), 271 F. (2d) 200, cert. granted, 361 U.S. ..., have been abandoned in view of this court's decision reversing that case, ... L. ed. 21 ..., in advance sheets issued today.

section 1635 (b) (2) provide a penalty rather than liquidated damages?

This Court in *Rex Trailer Co. v. United States*, 350 U. S. 148, held that the $2000 recoverable under section 1635 (b) (1) was liquidated damages and bottomed its decision on the provisions relating to building contracts under 40 U. S. C. A. section 269 (now embodied in Title 41 U. S. C. A.). In this regard Congress has laid down Rules and Regulations in implementing Title 41, Public Contracts (41 U. S. C. A., Cum. Supp.) Section 14.315-2 (c) of these rules provides**:

> "The rate of liquidated damages stipulated must be reasonable in relation to anticipated damages, considered on a case-by-case basis, since liquidated damages fixed without any reasonable reference to probable damages may be held to be not compensation for anticipated damages caused by delay, but a penalty, and therefore unenforceable."

We thus have the clearly expressed intention of Congress and its policy that liquidated damages must have some reasonable relation to probable actual damages. In the case at bar the damages arbitrarily exacted were over $142,000,000, twice the amount paid for the goods, all without any proof of actual damages.

Section 1635 (b) (2), unlike section 1635 (b) (1), is not an off-shoot of the False Claims Act. (*See Rex Trailer Co. v. United States*, *supra*, at p. 152, footnote 4.) It is an entirely new provision and cannot, therefore, be said to assimilate the purpose and intent of the False Claims Act.

** [illegible] has not been

The recent decision of this Court in *United States v. Hazeltine*, 5 L. Ed. 2d 8, holding that section (b)(2) is applicable to cash sales as well as to sales on credit necessarily supports our contention. Since under that ruling, the person who has paid cash can be compelled to pay twice more, making threefold in all, and the person who has purchased on credit need pay only twice, the conclusion is inescapable that the amount of recovery has no relation whatsoever to probable damages but is purely *penal*. Indeed it may well be urged that this interpretation of section (b)(2) decrees different amounts of damages for precisely similar acts and thereby creates such an arbitrary and unreasonable classification as to be violative of the Fifth Amendment to the Constitution of the United States. See *De Veau v. Braisted, Collector of Internal Revenue*, 363 U. S. 144, 160.

We respectfully conclude that Congress by its declared policy, as quoted above, has firmly adhered to the traditional principles regarding liquidated damages. To hold now that section (b)(2) is not a penalty would be directly violative of the unequivocal expression of Congress. Consistently with that expression the court should construe section (b)(2) as "a penalty, and therefore an enforceable" without proof of actual damages. Judicial construction of the most liberal nature cannot make an enlargement which Congress has indicated is unwarranted.

Respectfully submitted,

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GEORGE STONE,

Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

The foregoing petition for rehearing is presented in good faith and not for delay, and the petition is restricted to the grounds above specified.

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GEORGE STONE,

Counsel for Petitioners.